

Food

This section aims at updating readers on the latest developments of risk-related aspects of food law at the EU level, giving information on legislation and case law on various matters, such as food safety, new diseases, animal health and welfare and food labelling.

Regulating Sustainability Claims on Seafood - EU Ecolabel, Unfair Commercial Practices Directive or Seafood Information Requirements?

Hanna Schebesta*

In February 2016, the Feasibility Report on options for an EU ecolabel scheme for fishery and aquaculture products was published. The study did not make a strong case for the introduction of a seafood EU Ecolabel, and it is unlikely that the European Commission will pursue this policy option. We argue that sustainability information on seafood should not be framed through the EU Ecolabel debate. The more pressing issue concerns self-declared sustainability claims on seafood products. As a possible solution, we propose to address these by re-invigorating the labelling rules on seafood information in the Regulation on the Common Organisation of the Markets in Fishery and Aquaculture Products.

Food policy has taken the sustainability turn. The focus on pure safety that followed the food crises of the millennium has given way to a 'good food' paradigm; good not only for consumers, but also for the environment and those involved in or affected by the production process. A consumer's product choice can now be a choice for 'the good'. A simple food purchase, then, becomes a political act. However, in order to exert their political will, consumers need information about the product.¹

I. The Regulation of Seafood Product Information

EU policy making has always seen the regulation of information as crucial. Improving consumer infor-

mation is often preferred over public regulation, a classic approach in EU law.² Particularly EU law on food exerts strong command and control over the information provided to consumers. Accordingly, food products are subject to strict labelling obligations.³ These are complemented by specific rules⁴ for fishery and aquaculture products ('seafood'), including product labelling, and sector-specific mandatory and voluntary information to consumers.⁵

In the midst of meticulously regulated package labelling rules, the freedom left to make environmental or broader sustainability claims is relatively untouched.⁶ However, EU policy makers have become wary that eco-labelling schemes may not keep what consumers think they promise. As a result, the Commission questioned whether the existing EU Ecolabel⁷ should be activated in order to regulate informa-

* Assistant Professor at Wageningen University.

1 Eloquently termed "political consumerism", see Micheletti and Boström, 'Political Consumerism: Consumer Choice, Information, and Labeling', in P. B. Thompson and D. M. Kaplan (eds.), *Encyclopedia of Food and Agricultural Ethics* (2014) 1508.

2 In fact, already the famous *Cassis de Dijon* case pursues this strategy, see for example Purnhagen, 'The Virtue of Cassis de

Dijon 25 Years Later—It Is Not Dead, It Just Smells Funny', in K. Purnhagen and P. Rott (eds.), *Varieties of European Economic Law and Regulation* (2014) 315.

3 Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the Provision of Food Information to Consumers, Amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and Repealing Commission Directive 87/250/EEC, Council Direc-

tion about the environmental or broader sustainability characteristics of food products.

II. The Feasibility Report on Options for an EU Ecolabel Scheme for Fishery and Aquaculture Products

Whether the EU Ecolabel could and should be used in food is an old debate. This is why the EU Ecolabel Regulation mandated that a feasibility study specifically for food, including seafood, be done. However, when the study was published, it did not make a strong case for the food EU Ecolabel. Rather, it recommended discussing alternative solutions such as extending the organic label to cover the environmental impacts of processing.⁸ This did not put the debate to rest, and the subsequent CMO Regulation equally obliged the Commission to conduct a feasibility study on options for an eco-label scheme – this time specifically for seafood. The Feasibility Report⁹ was published in 2016 and comprised a market study, stakeholder consultation, and a feasibility assessment for a seafood EU Ecolabel. Its key findings are summarized in the following.

The numbers clearly show that seafood is an issue of global dimension. Around 60% of the total EU supply of 14 million tonnes is imported. Fishery products account for roughly 80% and aquaculture for

20%, a distribution that is the same for imports and EU production.

The Feasibility Report studied 57 eco-schemes in detail, comprising certification schemes (52%), codes of conduct (23%), and consumer guidance (21%). Around half of the schemes address fishery and aquaculture products jointly, the remaining target fishery or aquaculture specifically. The data highlights the wide array of objectives pursued by these schemes. Almost all address ecological sustainability, but other issues are represented much less consistently: biodiversity preservation (65%), chain of custody (55%), environmental awareness (51%), animal health and welfare (47%), reducing waste (42%), social impact (39%), food quality (33%) and safety (23%), significant issues such as such as dolphin friendly, mangroves protection, GMOs (21%), carbon footprint (16%), and food miles (5%). Aquaculture and fishery specific schemes further differ significantly between one another on the animal health and welfare aspect. This issue is included in almost none of the fishery specific schemes, but in all of the aquaculture specific schemes. Further, fishery and aquaculture schemes are largely private, only around 20% of the schemes covered had public involvement. The main private eco-labels are Friend of the Sea (FoS), the Marine Stewardship Council (MSC), GlobalGAP Aquaculture Standards, and the Aquaculture Stewardship Council (ASC). In fact, the seafood eco-label market is distinct from other food domains in having relatively few important private players that occupy largely distinct product niches.

The data for 13 EU Member States shows that consumption patterns of certified seafood vary drastically across the EU. The presence of ecolabels on seafood products was categorized in the following groups: high, and also for organic products (AT, DE, DK, SE); high, but not for organic products (BE, NL, UK); intermediate (IT, FR, PL, FI); low, and in combination with large fish consumption (ES, PT). While southern Member States such as Spain, France, Italy have the largest expenditure for seafood in the EU, northern Member States have the highest presence of certified seafood. The study therefore confirms FAO findings that explain the strength of ecolabels' market presence by factors relating to (i) the dominance of supermarket over fresh fish markets, (ii) a traditionally limited range of species leading to lower substitutability of product, and (iii) a culture of processed and packaged products that lend themselves to the attachment of a label.¹⁰

tive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ L 304, 22.11.2011, pp. 18–63.

- 4 Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Organisation of the Markets in Fishery and Aquaculture Products, Amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and Repealing Council Regulation (EC) No 104/2000, OJ L 354, 28.12.2013, pp. 1–21, p. 1. ('CMO Regulation').
- 5 Article 35 and 39 of the CMO Regulation.
- 6 Environmental information and information of an ethical or social nature may be provided on a voluntary basis, as long as it is clear and unambiguous, Article 39(1) e) and f) of the CMO Regulation.
- 7 Regulation (EC) No 66/2010 of the European Parliament and of the Council of 25 November 2009 on the EU Ecolabel, OJ L 27, 30.1.2010, pp. 1–19. ('EU Ecolabel Regulation').
- 8 Oakdene Hollins, *EU Ecolabel for Food and Feed Products - Feasibility Study*, 2011.
- 9 MRAG, *Feasibility Report on Options for an EU Ecolabel Scheme for Fishery and Aquaculture Products*, 2016.
- 10 S. Washington and L. Ababouch, *Private Standards and Certification in Fisheries and Aquaculture: Current Practice and Emerging Issues*, 2011.

The analysis of the stakeholder consultation finds three main problems: label claims are not credible (validity issue), there is confusion due to the multitude of messages conveyed by labelling schemes (consistency issue), and the costs and market entry possibilities (cost issue) of ecolabel schemes are prohibitive. Further, consumer demand should not simply be assumed. The Feasibility Report points to observations in the literature that question the efficacy of eco-labels: quality and convenience may trump environmental considerations in actual buying situations; reported willingness to pay may not reflect actual behaviour; and in studies considering seafood specifically, other attributes such as price, best before date, freshness, physical appearance and food safety ranked higher than sustainability.¹¹

Finally, a feasibility assessment examines three policy options: no change, but using current legislation and available tools more effectively (Option 1); setting minimum requirements at EU level (Option 2); or creating an EU Ecolabel for seafood (Option 3). Option 1 enjoys the widest stakeholder support, and involves - relatively speaking - the least costs. The effectiveness of available tools could be supported by strengthening ongoing international benchmarking initiatives; improving the enforcement mechanisms of the current legal framework¹²; and by providing financial support for certification of businesses. On the downside, this option is not a strong remedy for validity and consistency concerns. Option 2 could address these, but might add to the complexity of the system as it duplicates ongoing international initiatives. The setting of minimum criteria at EU level seems to fail at necessity considerations, although the option enjoys around 70% endorsement in the stakeholder consultation. Option 3, the seafood EU Ecolabel, is described as a high cost solution with low net benefits and low stakeholder support. Further, it risks to enhance consumer confusion with the EU organic logo.

Put briefly, the seafood feasibility study - much like the general food EU Ecolabel study - does not provide strong support for a seafood EU Ecolabel.

III. Will Seafood Ecolabels be Regulated in the Future?

At this point, it seems unlikely that an EU Ecolabel for seafood will become a reality. The Commission

followed the findings of the Feasibility Report, and reported back to the European Parliament with a largely negative opinion on this option.¹³ It put forward doubts on the value added, coupled with significant costs. The Commission will most likely choose for policy making with a lighter touch, and seems open to the options of improving the current legislative framework or establishing minimum criteria.

The debate about the creation of a public EU Ecolabel for food and seafood reflects the need of public regulators to come to terms with the powers of private regulators in these sectors. Private standards have established themselves as a prime mode of governing food supply chains.¹⁴ Therefore, private standard setters, such as retailers drawing up a Code of Conduct or certification scheme owners, take on a regulatory role.¹⁵ The creation of EU Ecolabel would be a way of taking back some regulatory power from private to public regulators. Although this option is discarded for now, the Commission is sure to keep a watchful eye on how the private regulators perform in delivering on seafood sustainability.

And private regulation is not standing still. Meta-initiatives to develop criteria and benchmarking systems for seafood eco-scheming abound.¹⁶ If these initiatives gather sufficient support and traction, many of the identified shortcomings relating to validity will be addressed. Presumably, umbrella initiatives will also lead to greater coherence of the schemes. The Feasibility Report concluded that it "did not identify explicit market failures or a significant regulatory

11 However, it is important to note that the Feasibility Report did not carry out empirical behavioural studies on consumer attitudes and perceptions. The evidence on the consumer seems at this point inconclusive, with sometimes contradicting findings.

12 The Feasibility Report mentions particularly the Unfair Commercial Practices Directive and to some extent the Accreditation Regulation (EC) No. 765/2008.

13 European Commission, Report from the Commission to the European Parliament and the Council on Options for an EU Ecolabel Scheme for Fishery and Aquaculture Products, COM/2016/0263 final.

14 Henson and Reardon, 'Private Agri-Food Standards: Implications for Food Policy and the Agri-Food System', 30 *Food Policy* 241.

15 Cafaggi, 'Private Regulation, Supply Chain and Contractual Networks: The Case of Food Safety', EUI Working Papers, RSCAS 2010/10, Robert Schuman Centre for Advanced Studies, Private Regulation Series-03.

16 For example, *Comparison of Wild-Capture Fisheries Certification Schemes*, 2012, World Wildlife Fund, available at <http://www.worldwildlife.org/publications/comparison-of-wild-capture-fisheries-certification-schemes> (last visited 26 October 2016).

gap". It is probably more accurate to say that for the time being there is no indication that the problems – which undeniably exist - can be dealt with any better by a public regulator, here the EU, than the private regulators.

The reluctance to endorse a seafood EU Ecolabel is justified. Time will probably enable a better assessment of the performance of private regulation in solving problems of validity and consistency. At least, this seems to be the case for formal certification schemes.

IV. The Real Regulatory Gap: Sustainability Information on Seafood

It is unfortunate that the discussion about sustainability information on seafood was framed through the EU Ecolabel. Ecolabels are not the only form of sustainability information that packaging communicates to consumers. Many seafood products make simple textual sustainability claims such as 'sustainably sourced'. These self-declared claims are neither governed by private regulatory mechanisms such as certification schemes, nor public regulators.

In fact, sustainability claims not (visibly) supported by formal schemes are those escaping control and are most problematic from a point of view of verifiability and validity.

First, it is often unclear whether textual claims are substantiated. In many instances they are, for example through business-to-business accreditation initiatives or codes of conduct. A study on environmental claims on seafood in UK supermarkets¹⁷ found that seafood was often labelled with the statement 'responsibly farmed'. In some cases, these claims were, in fact, substantiated, as the products were organic or GlobalGAP certified. However, this is not always clearly indicated and some business-to-busi-

ness initiatives, such as GlobalGAP, do not even allow the use of their trademark on the product itself. Then it is a burdensome process for the consumer to verify whether a simple textual claim is substantiated.

Self-declared textual statements also run a higher risk of being invalid. ClientEarth¹⁸ has voiced a number of concerns on sustainability claims on seafood. For example, a tuna product was labelled as 'dolphin friendly' although the tuna was fished using purse seines and fish aggregating devices. Such practices are widely regarded as not sustainable. Also, several haddock and cod products were labelled as 'sustainably sourced' although they concerned a species from a stock that is classified by the International Convention for the Exploration of the Seas as being fished at an unsustainable level. It is doubtful that such products can make valid sustainability claims.

The identified private and public regulatory gap on self-declared sustainability claims on seafood products show that there is scope for improvement of the legislative framework.

V. Addressing Sustainability Claims on Seafood through Food Information Regulation, not the EU Ecolabel

The CMO Regulation requires that environmental, social and ethical claims on seafood must be clear and unambiguous.¹⁹ The problem of the concept of 'sustainability' is that it is inherently ambiguous.²⁰ Sustainability claims made through specific private ecolabel schemes become clear in that they pledge to adhere to the requirements of the relevant scheme. A Friend of the Sea logo promises 'sustainability' according to how Friend of the Sea defines sustainability. Those requirements are clear and verifiable. Mere textual sustainability claims, on the other hand, if not supported by a specific scheme, are inherently ambiguous and not (easily) verifiable. It is therefore necessary to strengthen the link between such claims and the source of their authority.

The CMO Regulation currently prohibits the provision of voluntary information that cannot be verified.²¹ This prohibition should be turned into a positive obligation. Self-declared sustainability claims could be required to provide a substantiation of why a certain claim can legitimately be made. A simple reference to the producer's code of conduct might

17 ClientEarth, Environmental Claims on Supermarket Seafood: Improving Product Labelling & Consumer Protection, 2011.

18 *Ibid.*

19 Article 39(1) e) and f) of the CMO Regulation.

20 See the number of issues covered by eco-labelling schemes reported in the Feasibility Report. There is a strict environmental understanding of sustainability that co-exist with a wider ecosystem approach, also taking into account socio-economic factors.

21 Article 39(4) of the CMO Regulation.

suffice. Graphically, the claim could be accompanied by an asterisk (*) referring to a different place on the product package with space for the substantiation. Such requirements of verifiability on the packaging could be included in Article 39 of the CMO Regulation on voluntary information on seafood products.

It is generally suggested that consumer law can be used to prohibit environmental claims that ‘mislead the consumer’ under the Unfair Commercial Practices Directive (UCPD).²² The Updated Guidance Document on the UCPD²³ provides an entire section on its use on environmental claims. However, the fact that the UCPD is a catch-all legislation is also its disadvantage – enforcing it will take an ad-hoc character, and will probably be successful to a very different degree across the Member States. The proposed change to the seafood information requirements in the CMO Regulation have had some advantages over the UCPD option. It has a much sharper legal bite as the Regulation is directly applicable in all Member States. More importantly, the proposal establishes a solution to the problem in the form of a clear obligation, namely that seafood sustainability claims must be substantiated on the product packaging. It thereby pre-empts the problem, rather than having to rely on ex-post enforcement on a case-by-case basis.

VI. Conclusions

For the moment, an EU Ecolabel specifically for seafood is off the table. As argued above, this does not mean that the EU Commission should let the issue of sustainability labelling entirely off the hook. The article proposes to address sustainability information not through public regulation in the form of an EU Ecolabel, but through re-invigorating the existing regulation of seafood information. At a conceptual level, the article shows that the usual dichotomy between self-declared and certified claims warrants a rethinking to pick up what is communicated to the consumer by distinguishing between unsubstantiated and substantiated claims on product packaging.

22 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market and Amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. Article 12 also requires Member States to grant authorities the power to request substantiation of claims from traders.

23 Notably the updated guidance on the Unfair Commercial Practice Directive develops this idea. Commission Staff Working Document. Guidance on the Implementation/application of Directive 2005/29/EC on Unfair Commercial Practices. A Comprehensive Approach to Stimulating Cross-Border E-Commerce for Europe's Citizens and Businesses, COM(2016) 320 Final.